No. 07-182

FILED
SEP 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KENNETH TALMON,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES P. CONDON
FRANCIS J. CAREY *
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
9377 W. Higgins Road
Rosemont, IL 60018
(847) 518-9800

* Counsel of Record — *Counsel for Respondent*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether Petitioner may raise for the first time before this Court an issue of constitutional due process that was not raised in any form in the courts below?

2. Even assuming Petitioner had in fact raised the issue of due process, whether the use of the arbitrary and capricious standard of review, in ERISA benefits cases by federal courts, deprives a benefit's claimant of due process?

3. Even assuming Petitioner had in fact raised the issue of due process, whether the Sixth Circuit denied the Petitioner any due process rights when it held that the decision of the Trustees of an employee pension benefit plan was not arbitrary and capricious, and where Petitioner has not pointed to any evidence that he was prevented from including in the administrative record before the benefit plan Trustees?

PARTIES TO THE PROCEEDING

Petitioner

Kenneth Talmon is a retired participant of the Central States. Southeast and Southwest Areas Pension Fund.

Respondent

Central States. Southeast and Southwest Areas Pension Fund is a multiemployer pension benefit plan as defined by ERISA. 29 U.S.C. §§ 1002(2)(A) and 1002(37).

The Board of Trustees of the Central States. Southeast and Southwest Areas Pension Fund is the plan administrator of the Central States. Southeast and Southwest Areas Pension Fund within the meaning of ERISA. 29 U.S.C. § 1002(16)(B).

CORPORATE DISCLOSURE STATEMENT

Respondent does not have parent corporations and no public company owns stock in Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
A. The Trustees' Denial of Mr. Talmon's Administrative Appeal	2
B. The District Court Held That The Trustees' Decision Was Reasonable	4
C. The Sixth Circuit Affirmed the District Court...	
REASONS FOR DENYING THE PETITION	6
A. There Is No Compelling Reason To Grant Mr. Talmon's Petition	6
B. Application Of The Arbitrary and Capricious Standard Is Consistent With Due Process	9
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

American Const. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372 (1893) 6

Firestone Tire & Rubber Company v. Bruch, 489 U.S. 101(1989) 7, 14

Glover v. U.S., 531 U.S. 198 (2001) 8

Lau Ow Bew, 141 U.S. 583 (1891) 6

Moore v. LaFayette Life Insurance Company, 458 F.3d 416 (6th Cir. 2006) 10

Solorio v. U.S., 483 U.S. 435 (1987) 7

Talmon v. Central States, Southeast and Southwest Areas Pension Fund, et al., No. 1:05 CV 1330 (ND Ohio, January 6, 2006) 5

Talmon v. Central States, Southeast and Southwest Areas Pension Fund, Slip Op., 2007 WL 1376288 (6th Cir. May 11, 2007) 5

University Hospitals of Cleveland v. South Lorain Merchants Association, 442 F.3d 430, 434 (6th Cir. 2006) 11

Wilkins v. Baptist Healthcare System, Inc., 150 F.3d 609 (6th Cir. 1998) 10, 11, 15

STATUTES

29 U.S.C. § 1002(2)(A) ii

29 U.S.C. § 1002(16)(B) ii

29 U.S.C. § 1002(37) ii

29 U.S.C. § 1132(a) 1

29 U.S.C. § 1132(a)(1)(B) 7, 10, 14

29 U.S.C. § 1133 ..... 2, 11, 13

RULES

Supreme Court Rule 10 6

IN THE

Supreme Court of the United States

No. 07-182

KENNETH TALMON,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PERTINENT STATUTES

29 U.S.C § 1132(a) provides, in pertinent part, as follows:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. § 1133 provides as follows:

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

* * * *

STATEMENT OF THE CASE

A. The Trustees' Denial of Mr. Talmon's Administrative Appeal.

Kenneth Talmon became a participant of the Central States, Southeast and Southwest Areas Pension Funds ("Central States") in 1969, when Southern Express first became obligated to make pension contributions for him to Central States. (ASA, pp. 550-552).[1] He worked for Southern Express and then for Illinois California Express ("ICX") under collective bargaining agreements, negotiated between his employers and affiliates of the International Brotherhood of Teamsters, requiring contributions to Central States, for the purpose of earning pension credits, until his layoff from ICX in July of 1980. He earned 10.750 years of Service Credit with Central States. (ASA, pp. 547-548). Mr. Talmon was 44 years old when he left Central States' covered service in 1980.

[1] "ASA __" refers to Appellee's Supplemental Appendix filed in the Sixth Circuit. "ADJA __" refers to the Appellant's Draft Joint Appendix filed in the Sixth Circuit.

Although Mr. Talmon qualifies for a Vested Pension from Central States, he does not qualify for any other benefit. He would need 30 years of Combined Service Credit to qualify for a Partial Early Retirement Pension, because he left covered employment before age 50.[2] No contributions were paid to Central States for Mr. Talmon after 1980. (ASA, pp. 540-541).

In 1993 Mr. Talmon applied for a Partial Early Retirement Pension, but his application was rejected by Central States because he had earned only 10.750 years of service credit. Mr. Talmon had claimed that he also earned service credit starting in 1962 with another pension fund, the Teamsters Union Local No. 293 Pension Plan, ("Local 293 Plan") and his credit with that Fund should be combined with the credit he earned with Central States. But, Central States advised him, even if he earned credit with the Local 293 Plan for 1962 to 1969, that amount of additional credit would still not allow him to meet the 30 year requirement. Then, on April 12, 1994, the Local 293 Plan informed Central States that Mr. Talmon had sustained a break in service in 1968, so he lost any credit he had earned with it. (ASA, p. 532).[3]

---

[2] The Central States Plan Document explains that a Partial Early Retirement Pension may be provided when a participant's credited service is not otherwise sufficient to create eligibility because the participant's years of employment were divided between employers maintaining different pension plans. Credited service accumulated by a participant under a Related Plan is recognized and credited by Central States as Related Credited Service. To be eligible for a Partial Pension, a participant must be eligible for a Partial Pension from a Related Plan. (ASA, p. 264).

[3] Mr. Talmon's petition incorrectly says, "Teamster Local Union No. 293 has claimed that Petitioner had a break in service in 1968 which is false." (Pet. for Cert. p. 2). A correct statement is that, "a totally separate and distinct employee pension benefit plan, Teamsters Union Local No. 293 Pension Plan, of Cleveland Ohio, wrote Central States on April 12, 1994 and told Central States that Mr. Talmon sustained a break in service under the plan and that his break would cause him to forfeit his credited service." (ASA, p. 532).

Mr. Talmon, through his attorney, filed an administrative appeal of Central States refusal to grant him a Partial Early Retirement Pension. During his appeal Mr. Talmon argued that, although ICX went out of business in Ohio in 1980, it continued to conduct business in other states until it went bankrupt and ceased business in 1985, so he should have been allowed to transfer to another ICX terminal to continue working to earn additional contributory credit. He also argued that he did not have a break in service with the Local No. 293 Plan. (ASA, pp. 502-507, 283-295).

On March 23, 2005 the Central States Trustees denied Mr. Talmon's administrative appeal for additional contributory credit based upon contributions which he said should have been paid by ICX for him after 1980. The Trustees however agreed that Southern Express was required to make employer contributions for him beginning July 23, 1969 (Southern Express had only made contributions for him starting in September of 1969). The additional credit awarded for 1969 meant that Mr. Talmon had earned a total of 11.250 years of service credit. But, the Trustees also explained that, even with the additional credit in 1969, and even if the Local 293 Plan certified 4.33 years of credit under that plan, and even if Mr. Talmon made the maximum amount of self-contributions allowable under the Central States' plan, he still could not establish 30 years of Combined Service Credit to become eligible for a Partial Early Retirement Pension. (ASA, p. 281). Because Central States granted Mr. Talmon additional contributory credit for employment with Southern Express (which increased his 1969 contributions to 22 weeks) his Vested Pension increased from $151.18 per month to $156.46 per month. (ASA, pp. 557-559).

B. The District Court Held That The Trustees' Decision Was Reasonable.

On May 16, 2005 Mr. Talmon sued Central States in the Northern District of Ohio alleging a fiduciary breach claim

and an ERISA benefits claim.[4] The district court examined the discretionary grants of authority, granted to the Central States Trustees in the Central States Pension Fund Trust Agreement and, because the Trustees had discretionary and final authority in construing their plan documents and making decisions upon claims for benefits, it determined that under the well-established precedent in the Sixth Circuit, the Trustees' decision would be reviewed under the arbitrary and capricious standard. (See, *Pet. for Cert.*, App. B, p. 13A). The district court rejected Mr. Talmon's arguments that he was entitled to additional credit under the Central States plan either prior to 1969 or after 1980. It pointed out that the Local 293 Plan had independently concluded that Mr. Talmon lost the credit he earned between 1963 to 1969 under that plan, because of a break in service. Central States had no authority to grant service which another pension plan determined to be forfeited. And, Mr. Talmon did not work after 1980 and ICX paid no pension contributions to Central States for him after 1980. The court stated that if Mr. Talmon felt he should have been employed after 1980 under the terms of a collective bargaining agreement, that issue should have been resolved by Mr. Talmon through the grievance procedure under the union contract. The district court concluded that, because Mr. Talmon was entitled to no additional credit prior to 1969 or after 1980, Central States' decision that he did not earn a Partial Pension was fully supported by the administrative record, and was not arbitrary and capricious. (*Id.* pp. 18A-20A).

---

[4] The district court granted Central States' Motion to Dismiss with respect to the fiduciary breach claim. (*Talmon v. Central States, Southeast and Southwest Areas Pension Fund, et al.*, No. 1:05 CV 1330 (ND Ohio, January 6, 2006), *See*, App. B to *Pet. for Cert.*). Mr. Talmon did not challenge the dismissal of his fiduciary breach claim in the Sixth Circuit. (*Talmon v. Central States, Southeast and Southwest Areas Pension Fund*, Slip Op., 2007 WL 1376288 (6th Cir. May 11, 2007), *See*, App. A to *Pet. for Cert.*).

The district court entered judgment in favor of Central States on January 6, 2006. (*See, App. C to Pet. for Cert.*).

C. The Sixth Circuit Affirmed the District Court.

Mr. Talmon appealed to the Sixth Circuit and it affirmed the lower court. The Sixth Circuit found that Mr. Talmon offered no legal or factual support, either in the Sixth Circuit or the lower court, that the Trustees' decision should be reviewed *de novo*. The court pointed out that his only argument as to why the *de novo* standard should be used was that the arbitrary and capricious standard results in an unjust and inequitable decision. But there was no support for that claim. (*Pet. for Cert.*, App. A, p. 3A). The court found that the Trustees' decision was rational and supported by the evidence, and even if Mr. Talmon were awarded credit for all of the years in dispute, he would still fall far short of the requisite 30 years of service credit needed for a Partial Pension. (*Id.* pp. 4A-5A).

REASONS FOR DENYING THE PETITION

A. There Is No Compelling Reason To Grant Mr. Talmon's Petition.

After this Court's decision in *Lau Ow Bew*, 141 U.S. 583 (1891), this Court has exercised great restraint in granting certiorari. The power has been sparingly used and reserved for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 383 (1893). Mr. Talmon's case satisfies neither requirement and satisfies none of the "compelling reasons" listed in Supreme Court Rule 10. There is no conflict between the circuit courts on any issue raised by Mr. Talmon. Moreover, no important federal question was decided in a way which conflicts with decisions from this Court.

The reason Mr. Talmon advances for granting his petition is that the application of the arbitrary and capricious standard by the district court deprived him of due process.[5] However, Mr. Talmon failed to raise any due process objection to the "arbitrary and capricious" standard in the courts below. He therefore has waived this objection. *See, e.g., Solorio v. U.S.*, 483 U.S. 435, 451, fn. 18 (1987). Moreover, Mr. Talmon's argument, on its face, is illogical and inconsistent. On one hand, he says that had the district court afforded a *de novo* review of the administrative record, this would have allowed him "to provide important relevant evidence to the court indicating that he did not suffer a break in service and therefore was entitled to receive his full pension benefit." (*Pet. for Cert., p. 5*). But, on the other hand, Mr. Talmon says that the Trustees miscalculated his service and their decision to deny him additional credit "was without any basis in the administrative record." (*Pet. for Cert., p. 3*). In support of his conclusion that his pension was miscalculated, Mr. Talmon lists all the evidence he presented during his administrative appeal in support of his arguments for additional credit, including the fact that, "Frank Burdell, President of Local Union No. 407, investigated Petitioner's claims and concluded based upon the evidence that Petitioner did not have a break in service." (*Pet. for Cert. p. 2*). Mr. Talmon can not have it both ways. He can not say that the administrative record contains substantial evidence, including an investigation by a former local union President, which supports that he did not have a break in service, but then also argue that, had the district court applied a *de novo* review, he would have been able to provide relevant evidence indicating he did not have a break in service. Mr. Talmon does not

---

[5] The arbitrary and capricious standard of review in ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) actions challenging denial of benefits based on plan interpretations is appropriate when plan administrators exercise discretionary powers. *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101 (1989).

indicate what "important relevant evidence" he is referring to. Presumably, the evidence of Frank Burdell, who investigated his break in service, was important and relevant, but he concedes that Mr. Burdell's evidence in fact was presented to the Trustees and rejected by them.

When the Sixth Circuit upheld the district court's application of the arbitrary and capricious standard to Mr. Talmon's administrative appeal, it pointed out, "Both parties agree that the district court may only consider the evidence that was before the plan administer at the time of the original decision." (*Pet. for Cert.* App. A, p. 3A). Indeed, even though Mr. Talmon now contends that the *de novo* review should apply, nonetheless, he still recognizes in his petition that, even under a *de novo* review, the reviewing court "may not consider new evidence or look beyond the record that was before the administrator." (*Pet. for Cert., p. 5*). But, now in an argument never made in the lower courts, Mr. Talmon says that he was deprived of due process by the district court's application of the arbitrary and capricious standard because a court's review is limited to the administrative record. (*Pet. for Cert.* p. 5).

Mr. Talmon never raised the argument in the lower courts that he wanted to submit any evidence beyond what was already in the administrative record. He never asked for a remand to the Trustees for them to consider additional evidence. Mr. Talmon completely neglects to describe what additional evidence he wanted the lower court to consider and in what respect the evidence would be relevant to support his claim to a pension benefit requiring 30 years of service credit. Because Mr. Talmon did not raise the argument in the lower courts that he was deprived of due process by the application of the arbitrary and capricious standard, he should not be allowed to raise it for the first time before this Court. *Glover v. U.S.* 531 U.S. 198, 205 (2001).

Mr. Talmon's due process argument is particularly unpersuasive because, as pointed out by the Sixth Circuit, even if he established full years of contributions from 1980 through July of 1984 and full years of credit under Local 293 Pension Plan from 1967 to 1969, "he still would not have established the 30 years of Combined Credited Service (required when a participant leaves covered employment before age fifty) to qualify for a Partial Pension." So, even "if Talmon were awarded credit for all the years in dispute, he would still fall far short of the requisite 30 years of credited service for a Partial Pension." (*Pet. for Cert., App. A, p. 4A*).

B. Application Of The Arbitrary and Capricious Standard Is Consistent With Due Process.

Mr. Talmon argues, that the application of the arbitrary and capricious standard deprives him of a property interest. He states that the Due Process Clause was intended to promote fairness by requiring the government to follow appropriate procedures. (*Pet. for Cert.* p. 6). But Mr. Talmon's argument has no basis in fact or law. He was treated fairly and appropriate procedures were followed in his case. He points out no additional evidence which would have supported his administrative appeal, which was not in the administrative record and considered by the Trustees (and thus also reviewed by the lower courts). He only makes the vague argument, that if a *de novo* review was conducted in the district court, he would have been able to "provide important relevant evidence to the court indicating that he did not suffer a break in service . . ." (*Pet. for Cert.* p. 5). But, earlier in his petition, he concedes that the Trustees considered, and rejected, evidence he offered that he did not have a break in service. (*Pet. for Cert.* p. 2). Mr. Talmon could not be any more clear in describing what evidence he presented in his administrative appeal and what the Trustees considered. He lists the evidence in the administrative record which he says supported his appeal and states, "all of the foregoing was

submitted to Respondent by Petitioner to no avail." (*Pet. for Cert.* p. 3). So, as a factual matter, nothing shows that Mr. Talmon was prohibited from presenting any additional evidence in the administrative record which would have swayed the Trustees in his favor. In fact, his petition supports the opposite conclusion. He lists all the evidence that was before the Trustees, including the investigation by Frank Burdell, and only complains that it was submitted by him "to no avail." (*Pet. for Cert.* p. 3).

And, as a matter of law, Mr. Talmon also comes up short. Settled law in the Sixth Circuit already holds that evidence outside of the administrative record may be offered in support of a procedural challenge to an administrator's decision, such as an alleged lack of due process afforded by the administrator. *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 618-619 (6th Cir. 1998). In a later case, the Sixth Circuit noted that the *Wilkins* panel foresaw occasions in which the procedural process of gathering all pertinent information may have broken down at the administrative level. In that circumstance, if discovery into the alleged procedural defects supports the plaintiff's allegations of due process denial, then a district court is obligated to permit discovery. *Moore v. LaFayette Life Insurance Company*, 458 F.3d 416, 430-431 (6th Cir. 2006). But, Mr. Talmon did not complain about any lack of procedural fairness in the courts below, and did not invoke the existing safeguard designed to protect his procedural rights. Mr. Talmon wants this Court to grant his petition because he says that he was not afforded due process under the arbitrary and capricious standard, and that a *de novo* review would have allowed him to provide important relevant evidence to the court. He seems to argue that a *de novo* review should be used in every case of a benefits claim under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). But Mr. Talmon never complained in the lower courts that he had any additional evidence to offer. If he had complained to the district court that he wanted to supplement the administrative

record then, under settled authority, the court would have considered whether due process required any evidence to be considered beyond the administrative record. *See, e.g. Wilkins, id.* at 618.

The facts of Mr. Talmon's administrative appeals and the decisions of the lower courts support the conclusion that he was granted exemplary due process at every level. Under ERISA § 503, an administrator must provide a claimant with written notice and a reasonable opportunity for a full and through review of any denial by the plan administrator. 29 U.S.C. § 1133. If there is a violation of this rule, then the appropriate remedy is to ask the district court to reconsider the denial of benefits after the claimant has been given the opportunity to submit additional evidence. *University Hospitals of Cleveland v. South Lorain Merchants Association*, 441 F.3d 430, 434 (6th Cir. 2006). But the fact of the matter is, the administrative record shows that Mr. Talmon had every opportunity, on several occasions, to present whatever evidence he thought was relevant for consideration during the administrative appeals process. If he provided the evidence to Central States, it would be in the administrative record reviewed by the district court. The administrative record highlights several examples of the procedural safeguards afforded Mr. Talmon during the administrative review process.

For example, on March 14, 1994 Mr. Talmon was advised by Central States that he did not qualify for a Partial Early Retirement Pension. He only had earned 10.750 years of service credit but he needed 30 years of service credit because he left covered employment before age 50. He was told that if he did not agree with the decision, he had a right to appeal and he was furnished with the administrative appeals procedures. (ASA, p. 540).

On April 20, 1994, he was again given the opportunity to appeal the adverse decision by Central States upon his application for a Partial Early Retirement Pension. Central States

told him that he needed 30 years of service credit to qualify for the benefit and he had not established the service credit needed. Central States also said, "If you feel the decision was incorrect, you have the right to appeal. Please refer to the enclosed appellate procedures." (ASA. p. 530).

On January 28, 2000, Mr. Talmon was again advised by Central States that the Local 293 Plan had informed it that, although he had earned 4.33 years of credit with that plan for the years 1963 to 1968, he incurred a break in service and forfeited the service credit with the Local 293 Plan. Central States also again explained that, because he left employment before age 50, he needed 30 years of service credit to become eligible for a higher benefit. (ASA. p. 516).

On February 19, 2002, Mr. Talmon's attorney was told that no administrative appeal had ever been filed by Mr. Talmon. (ASA. p. 509). Mr. Talmon's appeal was subsequently filed, and on October 14, 2002 Central States told Mr. Talmon and his attorney that his appeal would be considered by the Central States Benefits Claim Appeals Committee. (ASA. p. 501). Mr. Talmon through his attorney, furnished Central States a detailed submission, including the arguments that he did not suffer a break in service with the Local 293 Plan and that he should have been given an opportunity to continue working after ICX went of business in Ohio in 1980, because the company continued to operate in other locations. The Benefits Claim Appeals Committee considered his arguments but denied Mr. Talmon's appeal. (ASA. p. 466). On January 3, 2003, the Benefits Claim Appeals Committee explained the reasons for its denial of his appeal. A determination letter pointed out the Committee found that Mr. Talmon was not eligible for a Partial Early Retirement Pension because he had not established 30 years of combined service credit. The Committee pointed out that the Local 293 Pension Plan told Central States that Mr. Talmon had sustained a break in service in December of 1966 with that plan. The Committee also pointed out that no contributions were required to be

made for Mr. Talmon after July 26, 1980, when he was placed on layoff by ICX. And, in any case, even if he established full contributions between 1980 through July of 1984 and full years of credit with the Local 293 Plan from 1967 to 1969, he still would have not have established the 30 years of combined service credit he needed to qualify for an increased benefit.' (ASA, p. 463).

Mr. Talmon appealed the adverse decision of the Benefits Claim Appeals Committee to the Trustees. His attorney again submitted a comprehensive appeal for him. His attorney submitted a Summary of Arguments for the Trustees. (ASA, p. 296). The materials submitted for Mr. Talmon included affidavit evidence (with an affidavit from Frank Burdell) and affidavits from co-workers. Mr. Talmon and Mr. Burdell made a personal appearance before the Trustees. The Minutes of the Trustees' meeting of March 23, 2005 shows that the Trustees considered all the evidence submitted by Mr. Talmon and his attorney. They considered the arguments made during the personal appearance. A written submission on behalf of Mr. Talmon was distributed and reviewed by the Trustees. But, based on all the evidence, the Trustees still denied the appeal. (ASA, pp. 281-282). Mr. Talmon may not like the final result, but he can hardly complain of a lack of due process. He had every opportunity to submit all relevant evidence and arguments to the Trustees, both in writing and in person.

ERISA Section 503 requires that every participant whose claim for a benefit has been denied have a reasonable opportunity for a full and fair review by the fiduciary of the decision denying the claim. 29 U.S.C. § 1133. That is the essence of due process. The administrative record demonstrates that the requirements of Section 503 were met. Mr. Talmon was advised at every stage of the review process of the reasons why he did not qualify for a Partial Early Retirement Pension (he was substantially short of the 30 years of credit needed to qualify for the benefit). Mr. Talmon received

a full and fair review by the fiduciary. And, significantly, it was apparent to both the district court, and circuit court, that the break in service issue regarding his pre-1969 service credit was decided by a totally separate pension fund (the Local 293 Plan). The district court pointed out that the break in service issue was something that Mr. Talmon should have taken up with the other fund. It said, "Talmon has pointed to no provision in the Central States Pension Plan which gives Central States authority to credit service that another pension plan asserts was forfeited." (*Pet. for Cert.* App. B, p. 18A).

CONCLUSION

This Court has reserved its certiorari power for cases of peculiar gravity and general importance or to secure uniformity of decision. In this case, there is no issue of general importance to be decided nor any question of a split of authority among the circuit courts. Mr. Talmon wants this Court to grant his petition because he says the application of the arbitrary and capricious standard by the district court violated his due process rights. But, Mr. Talmon raised no issue of a lack of constitutionally protected due process in the courts below. Moreover, it is already settled law in the Sixth Circuit (and Mr. Talmon points no contrary authority in any other circuit), that a court may consider evidence outside the administrative record, if there is a claim of a violation of due process. So, this Court may wonder, what else does Mr. Talmon want this Court to decide? Does he want this Court to overrule *Firestone*? Does he contend that the arbitrary and capricious standard is never appropriate in an ERISA Section 502(a)(1)(B) benefits case?

And, how is it possible that Mr. Talmon, with a straight face, can claim that he was not afforded exemplary due process at every stage of the proceedings? Mr. Talmon never asked to submit additional evidence to the Trustees or to the district court. If he had complained in the lower courts that he was deprived of due process, because the Trustees did not

consider some important argument relating to his break in service, then under *Wilkins*, the district court would have been obligated to consider whether his complaint raised a due process issue. But he never made that claim.

And, for the sake of argument, even assuming everything Mr. Talmon argued in his petition has merit, nonetheless, there still would be no reasonable basis for this Court to grant his petition. It is clear from all the evidence before the district court and the Sixth Circuit, that the decision regarding Mr. Talmon's break in service, which resulted in the forfeiture of his pre-1969 credit, was a decision made by the Local 293 Plan, and not by Central States. The district court gave Mr. Talmon good advice when it said that if he did agree that his credited service, based upon contributions made to the Local 293 Pension Plan between 1963 and 1969 was forfeited, that was an issue he should have taken up with that plan. (*Pet. for Cert. App. B, p. 18A*).

The Sixth Circuit also recognized the futility of Mr. Talmon's position. It pointed out that even if the Central States Trustees had concluded that Mr. Talmon established full years of contributions between 1967 and 1969 and from 1980 to 1984, "he still would not have established the thirty years of Combined Credit Service (required when a participant leaves covered employment before age 50) to qualify for a Partial Pension." (*Pet. for Cert. App. A, p. 4A*)

Mr. Talmon's petition has no merit and it should be denied.

Respectfully submitted.

JAMES P. CONDON
FRANCIS J. CAREY *
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND
9377 W. Higgins Road
Rosemont, IL 60018
(847) 518-9800

* Counsel of Record

Counsel for Respondent